

NATIONAL LABOR RELATIONS BOARD

Evergreen Charter School,

Employer,
and

Alison Greene,

Petitioner,
and

**Evergreen Charter Staff Association,
NYSUT, AFT,**

Respondent.

Case No. 29-RD-175250

July 18, 2016

**PETITIONER ALISON GREENE'S OPPOSITION TO RESPONDENT EVERGREEN
CHARTER STAFF ASSOCIATION, NYSUT, AFT'S REQUEST FOR REVIEW OF THE
REGIONAL DIRECTOR'S DECISION**

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BACKGROUND

I. Procedural History

On April 18, 2016, Alison Greene, the Petitioner, filed a petition with the National Labor Relations Board (“NLRB”) Region 29 for a decertification election. Respondent Evergreen Charter Staff Association, NYSUT, AFT (“Respondent” or “union”) challenged whether the Employer, Evergreen Charter School (“Evergreen” or “Charter School”) was a private employer under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 151, *et seq.* On May 5, 2016, the parties filed position papers with the Region on the matter, and a hearing was held on May 12, 2016. On May 27, 2016, the Regional Director issued a decision finding that Evergreen was a private employer subject to the NLRB’s jurisdiction. Decision & Direction of Election (“RD Decision”), *Evergreen Charter Sch. & Alison Greene & Evergreen Charter Staff Ass’n* (“*Evergreen Charter Sch.*”), Case No. 29-RD-175250 (Region 29 May 27, 2016). The Regional Director also scheduled an election for June 15, 2016, which was later moved to June 16, 2016. On June 13, 2016, Respondent filed a Request for Review of the Regional Director’s Decision with this Board. Request for Review of the Reg’l Director’s Decision Dated May 27, 2016, Submitted by the Evergreen Charter Staff Ass’n, NYSUT, AFT, *Evergreen Charter Sch.* (“Union Request”).

On June 16, 2016, the decertification election was held, and the results tabulated. Excluding four challenged ballots in favor of no union, the final tally was 15 votes in favor of no union, and 11 votes in favor of Respondent. Respondent filed no objections to the election itself, and thus the results were certified on June 27, 2016. The Union Request should now be summarily dismissed, as the Regional Director’s decision was correct and there are no facts or circumstances warranting review.

II. New York Charter Schools Law

The New York Charter Schools Act, N.Y. EDUC. LAW § 2850, *et seq.* (2016) (“CSA” or “Act”), provides the framework for the establishment and operation of charter schools in New York. The CSA expressly provides that its purpose “is to authorize a system of charter schools to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate *independently* of existing schools and school districts in order to accomplish” goals enumerated within the Act. N.Y. Educ. Law § 2850.2

To allow “teachers, parents, school administrators, community residents or any combination thereof” to establish and operate charter schools, the Act provides that those individuals may file an application with the board of education of a school district, the board of trustees of the state university of New York, or the Board of the New York State Education Department (“NY Board”).¹ *Id.* at §§ 2851.1, 2851.3. After the charter application is approved, the applicant and charter entity, one of the three entities listed above, “enter into a proposed agreement allowing the applicants to organize and operate a charter school.” *Id.* at § 2852.5. The charter entity must approve the application, and then upon approval, will contract with the individual applicants, i.e. enter into a “proposed [charter] agreement,” which allows “the *applicants* to organize and operate [the] charter school.” *Id.* at § 2852.5 (emphasis added); *see also id.* at § 2851.3.

Once the charter entity enters into a proposed contract/charter with the charter applicants, “the charter entity other than the [NY] board of regents” submits the proposed contract to the NY Board for final approval and issuance of the charter. *Id.* at § 2852.5(d). Only the NY Board is authorized to issue a charter. *Id.* at §§ 2851.3(c); 2852.9-a(f). If the NY Board fails to act on the

¹ Charter applications can be submitted by individuals in combination with certain types of entities. N.Y. Educ. Law § 2851.1. Since no entity was involved in the charter application to establish Evergreen, that statutory provision is not relevant to determining whether Evergreen is public or private.

proposed contract within ninety days, it is deemed approved and a charter issued. *Id.* at § 2852.5-a. Once the NY Board approves the proposed contract/charter, it incorporates the applicants as an education corporation under Section 216 and 217 of the Education Law. *See id.* at § 2853.1(a). In incorporating the applicants into a charter school, the NY Board issues a certificate of incorporation, which for purposes of the CSA, is “the provisional charter issued by the board of regents to form the charter school as an educational corporation pursuant to sections two hundred sixteen and two hundred seventeen of this [Education] chapter.” *Id.* Nowhere does the CSA provide that the NY Board or charter entity can directly establish and operate a charter school. Rather, they are limited to approving applications from private individuals, and contracting with private individual applicants for those applicants to establish and operate charter schools.

The newly formed charter school, as an education corporation, has “all corporate powers necessary and desirable for carrying out a charter school program in accordance with the provisions of this article, other applicable laws and regulations and the terms of the charter, including . . . those powers granted under the provisions of the not-for-profit corporation law that are made applicable to charter schools” by § 216-a of New York’s Education Law. *Id.* at § 2853.1(b); *see id.* at § 216-a. As an education corporation, the charter school’s governing board has the same powers as governing boards of other education corporations formed by the NY Board under §§ 216 and/or 217 of the Education Law. *See id.* at § 2853.1(b) (“The powers of the trustees of the charter school shall include these powers specified in section two hundred twenty-six of this chapter”).

The Act provides a charter school is “an independent and autonomous public school,” *id.* at § 2853.1(c). Although the Act states that “powers granted to a charter school . . . constitute the performance of essential public purposes and governmental purposes of this state,” *id.* at

§ 2853.1(d), charter schools do not have the power to “levy taxes or to acquire property by eminent domain.” *Id.* at § 2853.1(e). A charter school’s governing board is authorized to accept gifts, donations or grants,” or to spend such, on behalf of the school. *Id.* at § 2856.3.

Moreover, charter schools are deemed nonpublic entities for several purposes such as zoning, land use regulation, and building code compliance purposes, *id.* at § 2853.3(a-2); designating, purchasing, and loaning textbooks, *see id.* at § 2853.4; computer software purchases; *see id.*; health and welfare services to children, *id.*; and other purposes. *Id.* Charter schools must comply with “health and safety, civil rights, and student assessment requirements that apply to public schools,” unless the Act specifies otherwise. *Id.* at § 2854.1(b). However, charter schools are “exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions,” unless provided otherwise by the CSA or the school’s charter. *Id.* at § 2854.1(b).

The CSA also provides that a charter school’s board of trustees “have *final authority* for policy and operational decisions of the school.” *Id.* at § 2853.1(f) (emphasis added). The board may delegate its “decision-making authority” to the school’s officers and employees as provide by the charter. *See id.* The NY Board and/or a charter entity merely have sufficient oversight to ensure that the charter school complies with state law, like with any other heavily regulated industry or government contractor. *See id.* at § 2853.2. In fact, the CSA expressly states that “[t]he regulatory power of the board of regents and the commissioner shall not extend to charter schools except” as “specifically provided” in the Act. *Id.* at § 2855.5. The CSA also states that neither the charter entity, the NY Board, local school district, nor the state can be held civilly liable for any actions or omissions of the charter school. *Id.* at § 2853.1(g).

Also, the Act provides that a charter school employee is “an employee of the education corporation formed to operate the charter school,” *not* of the local school district, NY Board, or other public entity. *See id.* at § 2854.3. The Act states that the charter school’s board of trustees “shall employ and contract with necessary teachers, administrators, and other school personnel.” *Id.* at § 2854.3(a-1). For purposes of retirement benefits, the CSA gives charter schools the option for its employees to be considered employees of the local school district in order to participate “in the teachers’ retirement system and other retirement systems open to public schools,” but does not mandate such participation. *Id.* at § 2854.3(c).

III. The Creation and Establishment of Evergreen Charter School

Three individuals, Sarah Brewster, Gil Bernarndino, and Ariel Sotelo (collectively the “Applicants”), completed an application to create and establish a charter school. Jt. Ex. 1. Other individuals were consulted and involved in the application process, but none of them were public officials/entities. Tr. at p.32, lines 15-24; p.33, lines 12-24; p.47, lines 10-25; p.48, lines 1-21. No one from the NY Board or any other public official/entity approached the Applicants about starting a charter school. *Id.* at p.32, line 25 through p.33, line 8. The Applicants and individuals acted on their own initiative. *Id.* at 31, line 21 through p.32, line 14; p.33, lines 1-8.

As part of the Application, the Applicants set forth Evergreen’s proposed governance structure, and listed ten individuals they wanted to serve on Evergreen’s initial governing board of trustees. Jt. Ex. 1; Tr. at p.32, line 7 through p.33, line 24; p.34, line 25 through p.35, line 14. No one from the NY Board or other public official/entity was involved in their decision. *Id.* The Application also included a proposed budget for Evergreen Charter School for a five-year term—all created by the Applicants and other non-public individuals. Jt. Ex. 1.

Once the application was complete, the Applicants submitted it to the NY Board. Tr. at 33, line 25; 34, lines 1-4. On January 13, 2009, the NY Board approved the charter application, without requesting any changes. Jt. Ex. 2. Also on January 13, the NY Board issued a provisional charter, i.e. “certificate of incorporation,” which incorporated “Sarah Brewster, Gil Bernardino, Ariel Sotelo, Gladys Rodriquez, Maritza Meyers and their successors as an education corporation under the corporate name of Evergreen Charter School.” *Id.*

The NY Board then entered into a written agreement with the Applicants on January 16, 2009 (“Agreement”), which authorized and granted a charter to the Applicants “on behalf and solely for the benefit of the Charter School as an education corporation . . . to establish, organize and operate” Evergreen. Jt. Ex. 2. The Agreement and its accompanying exhibits, which included the Applicants’ application, constituted the “charter” to establish and create Evergreen Charter School. *Id.*

The Agreement adopted Evergreen’s governance structure as set forth in the Application. School. Jt. Ex. 1, 2. The Agreement also provides that Evergreen’s board of trustees are to “operate pursuant to the by-laws of the Charter School set forth in the Application or as amended,” and not by any by-laws or other governing documents of the NY Board. Jt. Ex. 2. Consistent with the CSA, the Agreement provides that Evergreen’s board of trustees, and not the NY Board, “shall have final authority for policy and operational decisions of the school.” Jt. Ex. 2. The Agreement sets forth: i) the board of trustees’ control and hiring/firing over Evergreen’s personnel; ii) personnel policies and procedures; iii) that Evergreen “shall employ” individuals for instructional positions; iv) the option, but does not mandate, for Evergreen’s employees to be considered the local school district’s employees for retirement benefit purposes. *Id.*

Also after approving the charter application, the bylaws of Evergreen's board of trustees ("Bylaws") went into effect.² Jt. Ex. 4. The Bylaws enumerate the powers possessed by Evergreen's board of trustees. *Id.*; Tr. at p.43, lines 11-16. Pursuant to the Bylaws, Evergreen's board of trustees "shall conduct or direct the affairs of the School and exercise its powers." Jt. Ex. 4 at 1. The Bylaws further provide that the board of trustees "may delegate the management of the activities of the School to others, so long as the affairs of the School are managed, and its powers are exercised, under the *Board [of trustees'] ultimate jurisdiction. Id.* (emphasis added). According to the Bylaws, Evergreen's board of trustees has the power to: "elect and remove Trustees"; "select and remove" Evergreen's "officers, agents and employees," and prescribe powers, duties, and compensation for them; "conduct, manage and control the affairs and activities of the School"; and "approve the mission statement and policies that guide management and implementation of the School's programs." *Id.*

The Bylaws provide that Evergreen's board members are selected by a majority vote of the sitting board. Jt. Ex. 4 at 2. The Bylaws also set the board member office terms, meetings, eligibility, committees, board officer positions, *etc.* Jt. Ex. 4. They further provide that a board member can be removed either by a majority (with cause) or 100 percent (without cause) vote of the current board, except for the trustee subject to removal. *Id.*; Tr. at p.41, lines 14-25.

After the Applicants' application was approved, a provisional charter issued, and the Applicants entered into the Agreement with the NY Board, Evergreen's initial board of trustees got the Charter School up and running.³ Tr. at p.34, lines 7-21.

² The record is unclear as to when these bylaws were finally approved and implemented. The bylaws were part of the Application, and thus were included in the Application as part of an exhibit to the Agreement. *See* Jt. Ex. 1; Jt. Ex. 2.

³ Since its initial charter was granted, Evergreen was granted two charter renewals. Jt. Ex. 3. Any changes proposed in the renewals, and their implementation, were strictly made by Evergreen's board of trustees and administrative staff. Tr. at p.35, lines 18-25; p.36, lines 5-19. No public entity or official was involved. *Id.*

IV. The Operation and Governance of Evergreen Charter School

Pursuant to the Application, Agreement, and Bylaws, Evergreen's daily decisions and operations are controlled by its board of trustees and administrative staff, and not by any government officials or public entities. *See* Tr. at p.36, lines 20-24; Jt. Ex. 1, Jt. Ex. 2; Jt. Ex. 4. The board of trustees ensures that it and the school are meeting their charter obligations. Tr. at p.43, lines 5-10. Evergreen's board is responsible for overseeing and passing its budget. *Id.* at p. 43, lines 7-8. Evergreen's principal primarily oversees the Charter School's daily operations, but will consult with the board of trustees. Tr. at p.36, line 25 through p.37 line 6. The board of trustees provides oversight to the Charter School's fiscal office. *Id.* at p.37, line 5.

The board of trustees is also hires the principal, who then hires Evergreen's teaching staff and other employees. Evergreen Charter Schools is not part of the New York or local school district's "Teacher Retirement System," but allows its teachers to "individually contribute to a 403(b) plan." Tr. at p.38, lines 10 through p.39, line 1.

Since its inception, Evergreen's board of trustees has been composed of entirely private individuals.⁴ *Id.* at p.39, line 2 through p.41, line 11. All of Evergreen's executive officers, i.e. principal, director of data information, are private individuals. *Id.* at p.42, lines 13-17.

ARGUMENT IN OPPOSITION TO THE REQUEST FOR REVIEW

I. NLRB Jurisdiction and Charter Schools

A. *Chicago Mathematics & Science Academy, Inc.*, 359 NLRB No. 41, 2012 WL 6625117 (Dec. 14, 2012).

In *Chicago Mathematics*, the NLRB found the private, nonprofit corporation that established and operated a charter school in Illinois was not a political subdivision exempt from the NLRB's jurisdiction, but rather a private employer. 2012 WL 6625117, at *1. In that case,

⁴ One individual who serves on the board of trustees works for the Department of Social Services, but does not act in her official capacity when serving as an Evergreen board member. Tr. at p.40, line 2 through p.41, line 11.

Chicago Mathematics & Science Academy, Inc. (“CMSA”), a private, nonprofit corporation, established by five individuals, submitted a proposal to Chicago Public Schools, which is a division of the City of Chicago’s Board of Education (“Chicago Board”), for a charter to establish and operate a charter school, the Chicago Mathematics & Science Academy (“Academy”). *Id.* at *3-*4. Chicago Public Schools reviewed and approved the proposal, and then submitted it to the Chicago Board with a recommendation that it issue a charter. *Id.*

The Chicago Board approved the proposal, and granted CMSA a charter to establish the Academy. *Id.* at *4. CMSA then entered into a 5-year charter agreement with the Chicago Board, which included terms and conditions for operating the Academy, and incorporated CMSA’s charter proposal. *Id.* The Chicago Board could revoke the charter for material violation of the agreement’s terms. *Id.* CMSA received all of its funding for the charter school from public funds. *Id.* CMSA also made contributions to the Chicago Teachers’ Pension Fund on behalf of the Academy’s certified teachers. *Id.* at *5.

The NLRB held that CMSA was not created directly by the State of Illinois, nor by any “government entity, special statute, legislation, or public official.” *Id.* at *9. Rather, it found that private individuals created and incorporated CMSA as a non-profit corporation under Illinois’ non-profit legislation, and CMSA then established the charter school pursuant to Illinois’ charter school laws. *Id.*

The NLRB also found that there was no state statute “that directed charter schools be created or that directly creates charter schools.” *Id.* at *9. Rather, Illinois’ Charter School Law merely established a framework in which private individuals could create and operate charter schools. *Id.* The NLRB further found that nothing in the statutes indicated that the state legislature intended the State of Illinois itself to operate charter schools. *Id.* at *10. Rather,

because the charter school law allowed school districts to “contract with third parties to establish and operate charter schools,” the Board found that Illinois intended third parties to run and operate the schools. *Id.* Accordingly, the Board held that the charter schools operators were “akin to government contractors” by operating “public schools” for the State of Illinois. *Id.* Thus, CMSA did not satisfy *Hawkins County*’s first prong. *Id.*

For *Hawkins County*’s second prong, the NLRB found that CMSA was not administered by individuals responsible to public officials or the general electorate. *Id.* at *10. In so holding, the NLRB only focused on “whether the composition, selection and removal of the members of an employer’s governing board are determined by law, or solely by the employer’s governing documents.” *Id.* at *11, *12. If private individuals, not public officials, controlled the selection or removal of a “majority of an entity’s governing board members . . . the entity will be subject to the Board’s jurisdiction.” *Id.* at *11 (citations omitted). Also, CMSA’s bylaws, not any state law, statute, or regulation or public official, determined how CMSA’s governing board members were selected and removed. *Id.* at *12. Pursuant to those bylaws, “only [private] sitting board members” appointed or removed other board members, selected CMSA’s corporate officers, and sat on CMSA’s finance and audit committee,” not the Chicago Public Schools, the Chicago Board, or any public official. *Id.* at *10, *12. The NLRB also held that because none of CMSA’s governing board members were responsible to public officials in their capacity as board members. *Id.* at *12. Thus, the NLRB concluded that CMSA was not “administered” by individuals responsible to public officials or the general electorate, and therefore was not a political subdivision under the second prong of *Hawkins County*.⁵ *Id.* at *12.⁶

⁵ Because the NLRB found that CMSA was not created directly by the State, the Board did not need to analyze whether CMSA was considered an administrative arm of the state. *Chicago Mathematics*, 2012 WL 6625117 at *10 n.18.

⁶ Although *Chicago Mathematics* was decided by an illegally-appointed Board, *NLRB v. Noel Canning*,

Because CMSA did not satisfy either of *Hawkins County's* prongs, CMSA was not a political subdivision exempt from the NLRB's jurisdiction. *Id.* at *15.

B. *Pennsylvania Cyber Charter School*, 2014 WL 1390806 (NLRB Apr. 9, 2014) (unpublished opinion).

In *Pennsylvania Cyber Charter School* (“*Pennsylvania Cyber*”), the NLRB upheld the Regional Director's decision, which found that the charter school was a private employer, not an exempt political subdivision. 2014 WL 1390806, at *1. In so doing, the NLRB impliedly reaffirmed the holding of *Chicago Mathematics*, which both the Regional Director and Board relied upon in their decisions. *Id.* The NLRB also incorporated *Chicago Mathematics* into its own analysis by finding that Pennsylvania's choice of “cover[ing] charter-school employees under various laws governing public employees is . . . immaterial under *Chicago Mathematics*,” and therefore not controlling to determine if the entity is a political subdivision. *Id.* at *2.

The NLRB in *Pennsylvania Cyber* found that the charter school was not created directly by the state, but rather was a “nonprofit corporation created by private individuals.” *Id.* at *1. Although absent Pennsylvania's charter school law the entity may never have been created, the NLRB held that fact was irrelevant in the analysis. *Id.* The NLRB also found that *Hawkins County's* second prong was not satisfied because no “local or state official was involved in the selection or removal of any members of the Employer's governing Board of Trustees, or in the hiring of the Employer's staff, including its CEO.” *Id.* at *2. Nor were any of the board of trustees or CEO “directly and personally accountable to any state or local public officials or to the general electorate.” *Id.* Therefore, the NLRB concluded that the Regional Director correctly

134 S. Ct. 2250 (2014), in *Pennsylvania Cyber*, 2014 WL 1390806 (NLRB 2014) (unpublished opinion), the current, legally appointed Board essentially adopted the analysis and holding of *Chicago Mathematics* in its entirety, as discussed *infra*.

found the charter school to be a private employer within the NLRB's jurisdiction, and denied the employer's request for review. *Id.*

C. The NLRB and New York Charter Schools.

NLRB Region 29 has asserted jurisdiction over two New York charter schools—both of which are subject to the same New York Charter Schools Law as Evergreen Charter School. *Hyde Leadership Charter School—Brooklyn*, Decision & Direction of Election, Case No. 29-RM-126444 (NLRB Region 29 May 28, 2014); *Riverhead Charter School*, Decision & Direction of Election, Case No. 29-RD-132061 (NLRB Region 29 Aug. 14, 2014). In both cases, and relying upon the NLRB's analysis in *Chicago Mathematics* and *Pennsylvania Cyber*, the Regional Director found that the two New York charter schools did not satisfy either prong in *Hawkins County*, and thus were not political subdivisions exempt from the NLRB's jurisdiction.

Although both of decisions are awaiting appeal by the NLRB, the NLRB will most likely uphold the Regional Director's decision based upon its decision in *Pennsylvania Cyber*, *supra*.

II. Contrary to Respondent's assertion, the Regional Director's decision contains no factual errors, much less any that prejudice Respondent.

Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, exempts from its jurisdiction any employer that is considered a "State or political subdivision thereof[.]" 29 U.S.C. § 152(2); *see Research Found. of City Univ. of N.Y. ("Research Found.")*, 337 NLRB 965, 968 (2002). An entity is exempt from the NLRB's jurisdiction as a political subdivision if it is "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Nat. Gas Util. Dist. of Hawkins Cty. ("Hawkins County")*, 402 U.S. 600, 604-605 (1971); *see also Chicago Mathematics*, 2012 WL 6625117, at *8; *Research Found.*, 337 U.S. at 968. The NLRA "exempts only government entities or wholly

owned government corporations from its coverage—not private entities acting as contractors for the government.” *Research Found.*, 337 NLRB at 968 (citing *Aramark Corp. v. NLRB*, 179 F.3d 872, 878 (10th Cir. 1999)).

Here, the Regional Director correctly applied *Hawkins County* and found that Evergreen is not an exempt political subdivision, but a private employer subject to the NLRB’s jurisdiction.

A. The Regional Director correctly found that Evergreen Charter School was created by private individuals, and not the New York State Board of Regents.

“[T]o determine whether an entity is a political subdivision under the first prong of the *Hawkins County* test, the Board determines first whether the entity was created directly by the state, such as by a government entity, a legislative act, or a public official.” *Chicago Mathematics*, 2012 WL 6625117 at *9 (citing *Hawkins Cty.*, 402 U.S. at 604). If yes, then the Board determines “whether the entity was created so as to constitute a department or administrative arm of the government.” *Id.*

“The Board has routinely found employing entities to be exempt political subdivisions where they were created pursuant to legislation or statute in order to discharge a state function.” *Id.* at *9. “In contrast, the Board has consistently held that entities created by private individuals as nonprofit corporations are *not* exempt under the first prong of *Hawkins County*.” *Id.*; see *Reg’l Med. Ctr. at Memphis*, 343 NLRB 346 (2004), *Research Found.*, 337 NLRB 965; *Truman Med. Ctr. v. NLRB*, 641 F.2d 570, 573 (8th Cir. 1981); *Woodbury Cty. Cmty. Action Agency*, 299 NLRB 554 (1990), *rev’d on other grounds by Enrichment Serv. Program, Inc.*, 325 NLRB 818 (1998); *Econ. Security Corp.*, 299 NLRB 562 (1990) *rev’d on other grounds by Enrichment Serv. Program, Inc.*, 325 NLRB 818 (1998).

Respondent’s contention that the NY Board directly created Evergreen when it affirmatively voted to approve Evergreen and incorporate it into an education corporation is

misplaced. Union Request at 12, 13. Contrary to Respondent's claim, the NY Board' act of incorporating the Applicants and other individuals into an education corporation does not render Evergreen a "direct creation" by the NY Board. *Monroe Free Library & Commc 'ns Workers of Am.* ("Monroe Free Library"), 200 L.R.R.M. (BNA) ¶ 1819, 2014 WL 4640132, at *1, *6 (N.L.R.B. Reg'l Dir. Aug. 29, 2014) (finding that the "mere receipt of a charter of incorporation from the [New York Board of] Regents is insufficient to establish that the Employer was created by a government entity or legislative act"). In fact, "[t]he [NLRB] has previously asserted jurisdiction over educational employers who received charters of incorporation to establish educational institutions from the New York State Board of Regents." *Id.* at *1, *6; *see also Research Found.*, 337 NLRB 965; *Adelphi Univ.*, 195 NLRB 639 (1972)).

In *Research Foundation*, twelve individuals applied to create and operate Research Foundation as an education corporation. 337 NLRB at 965. The NY Board approved the application, incorporated the twelve individuals into an education corporation pursuant to Education Law § 216, and "granted a corporate charter to" them. *Id.* The NLRB characterized the education corporation as a "private corporation," which was "incorporated by private individuals," even though the NY Board was the entity that incorporated the individuals and provided them with a charter. *Id.* at 968.

Similarly, in *Monroe Free Library*, the employer, an association library, was founded by "nine private individuals who sought, and received, a charter of incorporation from the New York State Board of Regents to operate a non-profit educational institution." *Id.* at *6. The acting Regional Director found that the individuals' mere act of receiving the "charter of incorporation" was insufficient to find that the employer was directly created by the NY Board. *Id.*

Here, like in *Research Foundation* and *Monroe Free Library*, and based on New York's CSA, when the NY Board incorporated the Applicants and other individuals into an education corporation, it did so under its authority in Section 216 and 217 of the Education Law. *See* § 2852.1(a) (stating that the NY Board "certificate of incorporation" is the provisional charter it issues to form the charter school *as an education corporation pursuant to sections two hundred sixteen and two hundred seventeen*" of the Education law) (emphasis added); *see also* Jt. Ex. 2. Thus, the NLRB's holding in *Research Foundation* that incorporation as an education corporation does not render an employer to be "directly created" by the NY Board applies here and is binding. As such, Respondent's argument, and any interpretation of the Regional Director's decision to the contrary, must be rejected.

Likewise, Respondent's argument that the NY Board was directly involved in the creation of Evergreen when it voted to approve the Applicants' charter application must be rejected. Respondent ignores the fact that the NY Board has a general practice of affirmatively voting to approve any application for an education corporation before it issues a provisional charter. *See* Instructions & Sample Forms for Educ. Corps., <http://www.counsel.nysed.gov/pamphlet9/sectionii> (last visited July 13, 2016) (stating that after reviewing an application for a provisional charter, "the petition is submitted to the Regents with a staff recommendation, and the Regents then take formal action . . . If the Regents action is affirmative, the corporate existence commences immediately"); *see also Monroe Free Library*, 2014 WL 4640132 at *6-*7; *Research Found.*, 337 NLRB at 965; 8 NY Codes, Rules & Reg. § 3.24. Thus, when the NY Board voted to approve the Applicants' Application, it simply acted pursuant to its standard policy for all education corporations.

In contrast, Evergreen's creation is *akin* to the charter school in *Chicago Mathematics*. Similar to *Chicago Mathematics*, here, three individuals submitted an application to a government entity (the NY Board) to form and operate Evergreen charter school.⁷ See N.Y. Educ. Law § 2851.3; Jt. Ex. 1; *Chicago Mathematics*, 2012 WL 6625117 at *3. None of the individuals involved in completing and submitting the application were public officials or entities. Tr. at p.32, line 10 through p.33, line 24; Jt. Ex. 1. Like in *Chicago Mathematics*, the government entity's approval was required before the charter school could be established and run. N.Y. Educ. Law § 2851.3; Jt. Ex. 2; *Chicago Mathematics*, 2012 WL 6625117 at *3.

Once the NY Board approved the Applicants' application, it issued a provisional charter incorporating Brewster, Bernarndino, Sotelo, Rodriguez and Meyers into an education corporation. See N.Y. Educ. Law §§ 216, 217, 2852.1; Jt. Ex. 2. Similar to *Chicago Mathematics*, the incorporated individuals entered into a written agreement, i.e. government contract, with the NY Board for Evergreen's board of trustees to establish and operate Evergreen Charter School. After the provisional charter was issued, Evergreen's initial board of trustees, not the NY Board, got the charter school up and running. Tr. at p.34, lines 7-21; Jt. Ex. 4. Nowhere does the provisional charter, written Agreement, Application, or any other document list the NY Board as one of the incorporators of Evergreen or that it would be directly involved in the establishment and operation of the Charter School. See Jt. Ex. 1, 2, 3, 4.

Moreover, nothing in the CSA provides that the State of New York, the NY Board, or any other charter entity, government/public official or entity can, on their own independent initiative, establish and operate a charter school. This reflects the state legislature's express intention to allow individuals, not the State of New York, to establish and operate charter

⁷ Although the individuals were not incorporated before submitting their application to the NY Board, for the reasons discussed *supra*, that does not automatically render them to be directly created by the state.

schools. N.Y. Educ. Law § 2850. Thus, like in *Chicago Mathematics*, the Act provides for the NY Board and other charter entities to “contract with third parties to permit *others* to establish and operate charter schools, albeit within the framework of regulations fashioned by the state.” *See* 2012 WL 6625117 at *10. The fact that Evergreen operates pursuant to its “government contract” with NY Board is insufficient to find that it is “directly created” by the state as required to satisfy the first prong of *Hawkins County. Id.* at *9.

Therefore, the Regional Directly correctly found that Evergreen Charter School was directly created by private individuals, and not the NY Board.

B. Even if Evergreen was directly created by the New York Board of Regents, the Regional Director correctly held that Evergreen was not created to be an administrative arm of the State.

To determine if an entity is an “administrative arm of the state, the Board may consider such factors as the degree of governmental operating and budgeting control, the history of the employer, and whether the employer’s employees participate in retirement and health plans alongside state and local government employees.” *Monroe Free Library*, 2014 WL 4640132 at *5 (citing generally *Jervis Pub. Library Ass’n., Inc.*, 262 NLRB 1386, 1388 (1982)). Although a state’s characterization of an entity is an important factor, it is “not controlling in ascertaining whether an entity is a political subdivision.” *Chicago Mathematics*, 2012 WL 6625117, at *10 (citing *Hinds Cty. Human Resource Agency*, 331 NLRB 1404, 1404 (2002); *see also Hawkins Cty.*, 402 U.S. at 602. Here, the factors weigh heavily against finding that New York intended for charter schools to be considered an administrative arm of the State.

The degree of governmental operating and budgeting control factor weighs against finding that Evergreen is an administrative arm of the State. The CSA does not authorize the NY Board or any other public official/entity to have direct control over Evergreen’s daily operations.

In fact, the Act states that a charter school's governing board has final and direct control of the Charter School's operations. N.Y. Educ. Law § 2853.1(f). Here, the record clearly shows that Evergreen's board of trustees has direct control over its operations. Tr. at p.36, line 20 through p.9; Jt. Ex. 2.⁸

Although charter schools are subject to certain laws governing public schools for educational instruction, student assessment, *etc.*, the Act exempts charter schools from all other rules and regulations unless *specifically otherwise provided* in the Act or their charters. *Id.* at § 2854.1(b) (emphasis added). Similarly, although the NY Board has some oversight over Evergreen, the Act expressly limits the regulatory authority of the NY Board and Commissioner of Education for the State Education Department to only what is specified within the Act. *Id.* at § 2855.5. Moreover, this Board has found that charter schools are private employers even where charter schools are subject to oversight by their chartering entity, authorizer, or other public entity.⁹ See *Chicago Mathematics*, 2012 WL 6625117 at *5-*6, 10; *Penn. Cyber*, 2014 WL 1390806 at *2. Also, Evergreen's governing board plans, prepares, and implements its budget, without any input or involvement by the NY Board or any other public official/entity. Tr. at p.38, lines 3-9.

In *Research Foundation*, twelve private individuals applied for a corporate charter "under Section 216" of NY's Education Law to create a private, non-profit educational corporation,

⁸ In its Request for Review, Respondent blatantly ignores this statutory provision when it argues that the "governance and control" of Evergreen is vested with a public official – the Regents." Union Request at 18. Clearly, based on state law and Evergreen's charter, it is Evergreen's board of trustees, which is composed entirely of private individuals, and *not* the NY Board, that governs and controls Evergreen. Jt. Ex. 2, 4.

⁹ Respondent claims that the oversight factor supports finding Evergreen to be an administrative arm because it is subject to site visits by the NY State Education Department and submits annual reports to the NY Board. Union Request at 16. However, these visits and reports are more of a formality, and do not render Evergreen an administrative arm. Just because a government entity visits the site of a government contractor or reviews its budget and finance information does not make the contractor an administrative arm of the state. Thus, contrary to Respondent's contention, those two public entities' general oversight is not so "broad" to render Evergreen an administrative arm, especially since the two entities have no direct control or further involvement in Evergreen's daily operations, budget preparation and implementation, *etc.*

which the NY Board granted. 337 NLRB at 965. The charter designated the 12 individuals as the initial board of directors, and stated that the corporation’s purpose was to administer gifts and grants as trustee for the City University of New York (“CUNY”). *Id.* The NLRB found that the employer was not an administrative arm where the employer: had operated for forty years as a private entity; was incorporated by private individuals; did not receive public funds; was legally and fiscally separate from CUNY; filed separate tax returns and maintained separate legal representation from CUNY; exempt from certain laws that applied to government entities; operated independent of CUNY’s control; and maintained, through its independent board of directors and managers, “direct and independent control over its employees, management, labor relations, budget, and daily operations” from CUNY.¹⁰ *Id.* at 967-69.

Like the employer in *Research Foundation*, here, private individuals applied for a corporate charter under Section 216 of NY’s Education Law, and the CSA, to create a private, non-profit educational corporation, which the NY Board granted. Jt. Ex. 1. Also, similar to *Research Foundation*, Evergreen’s charter designated private individuals as Evergreen’s initial governing board, and set forth Evergreen’s corporate purpose. Jt. Ex. 2. Similar to *Research Foundation*, Evergreen is legally and fiscally separate from the NY Board—the government entity it contracts with; files separate tax returns and maintains separate legal representation from the NY Board; is exempt from certain laws that govern public schools; operates independent of the NY Board of Regent’s control; maintains, through its board of trustees and executive

¹⁰ Respondent misconstrues the basis of the NLRB’s decision in *Research Foundation* that the employer was not an administrative arm of the State. Union Request at 17-18. Contrary to Respondent’s assertion, the employer in *Research Foundation*, like Evergreen, operated pursuant to its charter from the NY Board and its contract with CUNY. Moreover, contrary to Respondent’s contention, although the NLRB recognized that the employer was not publicly funded and had voluntary oversight by CUNY, it primarily relied upon the fact that the employer operated independently from CUNY and that the employer, not CUNY directly controlled the employer’s operations when it held that the employer was not an administrative arm. *See Research Found.*, 337 NLRB at 968-69. For the reasons set forth *supra*, Evergreen, like the employer in *Research Foundation*, is directly controlled by its private board of trustees, not by the NY Board, and therefore, is not an administrative arm of the state.

officers, “direct and independent control over its employees, management, labor relations, budget, and daily operations”; and maintains management, operations, and labor relations policies and practices independent from NY Board. Jt. Ex. 1-4, Tr. at p.34, lines 10-21; p. 36, lines 20 through p. 39, line 9.

Although Evergreen submits annual reports and audits to the NY Board pursuant to the CSA, this is insufficient to demonstrate that Evergreen is an administrative arm of the state. Pursuant to the Act, it is Evergreen, not the NY Board, that exerts direct control over the school’s operation and decisionmaking. N.Y. Educ. Law § 2853.1(f); *see also* Jt. Ex. 2-4. Nor is there any evidence of the NY Board’s direct involvement in any of Evergreen’s daily operations or decisionmaking. Therefore, this factor weighs against finding that Evergreen were intended to be administrative arm of the state.

Evergreen’s history also weighs against finding it to be an administrative arm of New York. Evergreen has operated approximately seven years as a private non-for-profit education corporation. Evergreen’s board of trustees, which is composed of all private individuals, controls the School’s daily operations, decision-making, personnel decisions (including hiring/firing staff), budget, and other matters. Evergreen has not operated as a traditional public school, nor is subject to most of the rules and regulations that govern traditional public schools. Therefore, this factor weighs in favor of finding that Evergreen is not an administrative arm of the State.

Respondent argues that because Evergreen receives public funds, it is an administrative arm. Union Request at 15-16. However, government and defense contractors and non-profit entities frequently receive public grants and funds from the government, but that does not render them administrative arms. *Cf. State Bar of New Mexico*, 346 NLRB 674 (finding that even though entity received little to no public funds, based on other factors, it was an administrative

arm of the state). Therefore, Evergreen's receipt of public funds does not render make it a public entity.

Because neither Evergreen nor its employees participate in the state, city, or local public school retirement system or health insurance programs, this factor weighs against finding Evergreen to be an administrative arm of the state. Tr. at p.38, line 10 through p.39, line 1. Rather, Evergreen's employees have the option of making contributions to a 403(b) plan, which is available to private, non-profit entities. *Id.* at p.38, lines 14-16.

Respondent's reliance upon *Jervis Public Library* is distinguishable because in that case, unlike here, the employer and its employees participated in the state's retirement system and the city's health insurance program. 262 NLRB at 1388. In addition, the fact that New York's CSA does not *mandate* a charter school's participation in the state or public school retirement system further demonstrates that the legislature did not intend for charter schools to be administrative arms of the State. Even if Evergreen did participate in such programs, that alone does not render it an administrative arm *Cf. Chicago Mathematics*, 2012 WL 6625117 at *5, *10 (finding private employer even where charter school was required to make contributions to the city's public teachers' fund on behalf of its certified teachers) *Penn. Cyber*, 2014 WL 1390806 at *2 (finding charter school not to be public employer despite the fact that state law mandated that charter schools participate in the public school retirement system unless the charter school could provide an alternative retirement program to its employees at the time of application); *see* 24 PA. CONS. STAT. § 17-1724-A(c).

Contrary to Respondent's argument, New York's characterization of charter schools weighs against finding Evergreen to be an administrative arm. Union Request at 14-15. Although the CSA references charter schools as "public," it also classifies charter schools as "nonpublic."

See e.g. N.Y. Educ. Law § 2853.3(a-2) (“a charter school shall be deemed a nonpublic school for purposes of local zoning, land use regulation and building code compliance”); § 2853.4(a) (charter schools are deemed nonpublic schools for purposes of 711, 751, and 912 of the Education Law); § 2854.3(a) (employees of charter schools are not deemed public employees except for New York’s Public Employees’ Fair Employment Act or as otherwise specifically mentioned in the Act). The Act also exempts charter schools from several laws applicable to public schools, *id.* at § 2854.1(b), and limits the NY Board and the State Education Commissioner’s regulatory power over charter schools. *Id.* at § 2855.5.

Also, the CSA begins by stating that its purpose is for private individuals and entities to apply to open and establish charter schools. *Id.* at § 2851.1. Nowhere does the Act state that “the New York Board of Regents,” “local school district,” or other public entity is authorized to apply “to establish a charter school.” *See id.* Thus, by leaving the operation of charter schools in the hands of private parties, exempting charter schools from laws governing public schools, and limiting the NY Board and Commissioner’s regulatory power, the state legislature does not characterize charter schools as administrative arms of the state. Even if it did, such characterization does not control this Board’s determination. *Hawkins Cty.*, 402 U.S. at 602.

Even New York’s state courts have found that charter schools are not public entities. *See e.g. N.Y. Charter Sch. Ass’n v. DiNapoli*, 13 N.Y.3d 120 (2009); *N.Y. Charter Sch. Ass’n v. Smith*, 15 N.Y.3d 403 (2010). Finally, the New York PERB has dismissed cases involving a union’s request for certification of representation at charter schools because of the NLRB’s assertion of jurisdiction. *See Roosevelt Children’s Academy Workers’ Ass’n*, 48 PERB ¶ 3003, 2015 WL 660555 (Jan. 1, 2015); *United Fed’n of Teachers, Local 2, Charging Party, & Imagine ME Charter School, Respondent*, 47 PERB ¶ 3036, 2014 WL 7791956 (2014) (finding the

Regional Director and ALJs “did not err in conditionally dismissing the [certification] petition subject to” the NLRB’s decision in *Hyde Leadership*); *United Fed’n of Teachers, Local 2, Charging Party, & New Visions Charter High Sch. for the Humanities, Respondent*, 47 PERB ¶ 3023, 2014 WL 6449680 (2014). Thus, even the NY PERB has recognized that New York Charter Schools are not intended to be political subdivisions.

Respondent’s reliance upon *New York Institute for the Blind*, 254 NLRB 664 (1981) is also distinguishable for several reasons. Union Request at 14, 15. First, the employer in *New York Institute for the Blind* was formed under a different statute than the CSA. Second, the CSA states that its purpose is to allow private individuals to “establish and maintain schools that operate *independently*” of existing public schools and school districts. N.Y. Educ. Law § 2850.2. Thus, even though charter schools provide education, the state legislature intended them to operate as independent entities, and not as administrative arms of the state. In *New York Institute for the Blind*, however, the state was heavily and directly involved in the school’s operation, and the institute was a “state-authorized and state-utilized facility.” 254 NLRB at 667 n.24.

Third, throughout the statute, as discussed *supra*, and unlike in *New York Institute for the Blind*, the state legislature establishes charter schools as entities independent of the state or local government by exempting it from certain laws governing public schools, limiting the NY Board’s regulatory power of the schools, and classifying charter schools as “nonpublic” for certain purposes.

Fourth, simply because an entity provides education does not automatically render it an administrative arm of the state. *See NY Instit. for the Blind*, 254 NLRB at 665 and 667 n.24 (citing *The Krebs School Found., Inc.*, 243 NLRB 514 (1979)).¹¹ In fact, this Board has asserted

¹¹ Although in *Krebs School Foundation* the employer was found to be private under the “intimate connection” test, the NLRB in *NY Institute for the Blind* recognized the underlying principle that providing

jurisdiction over charter schools, which like Evergreen, provide education to children. *Chicago Mathematics*, 2012 WL 6625117 at *15; *Penn. Cyber*, 2014 WL 1390806 at *2. Therefore, Evergreen cannot be considered an administrative arm of the state simply for providing educational services.

For these reasons, the Regional Director correctly found that Evergreen was not created to be an administrative arm of the state.

C. Evergreen is not administered by individuals who are responsible to public officials or the general electorate.

When determining whether an entity is “administered by individuals who are responsible to public officials or to the general electorate,” the NLRB “examines whether those individuals are appointed by or subject to removal by public officials.” *Chicago Mathematics*, 2012 WL 6625117 at *10. In making that determination, the Board’s “sole focus is on the composition of the [employer’s] board of directors and to whom they are accountable,” which is the determining factor in *Hawkins*’ second prong analysis. *Id.* at *12. The NLRB refers to other factors “only after making a political subdivision finding based on its examination of the method of appointment and removal of an entity’s governing board.” *Id.*

Pursuant to state law and Evergreen’s bylaws, it is Evergreen’s board of trustees, and not the NY Board that controls the School’s policy and operational decisions. *See* N.Y. Educ. Law § 2853.1(f) (“the board of trustees of the charter school has the final authority for the school’s policy and operational decisions”); Jt. Ex. 4. Also, similar to *Chicago Mathematics*, Evergreen’s governing board is established by the School’s bylaws, “and not by any law, statute, or governmental regulation.” The Applicants, and other private individuals involved in completing the Application, on their own initiative created the governance structure for Evergreen. No one

education services alone does not render an entity an administrative arm of the state. *See NY Instit. for the Blind*, 254 NLRB at 667 n.24.

associated with the NY Board or any public official or entity was involved in the matter. Tr. at p.32, line 7 through p.33, line 24.

Also pursuant to the Evergreen's bylaws, the current board of trustee members select and remove other board members. Pursuant to Evergreen's charter, only Evergreen's board of trustees has power to hire/fire school administration, teaching staff, and other employees. Jt. Ex. 2, 3. The board has delegated some of its powers to the principal, who selects/removes school administrative ("executive officers") and teaching staff, with input from the board of trustees. Tr. at p.37, lines 7-18. No public official or entity is involved in the selection or removal of Evergreen's board of trustees or executive officers. *Id.* at p.35, lines 1-14, p.41, line 14 through p.42, line 17. Thus, neither Evergreen's board of trustees nor executive officers are directly accountable to public officials or the general electorate. *Penn. Cyber*, 2014 WL 1390806 at *2.

Respondent claims that the NY Board may remove a board of trustee from Evergreen's governing board pursuant to Education Law § 226.4. Union Request at 20. First, it is unclear as to whether this provision applies to charter schools. Second, if it does apply, the union ignores the qualification language in § 226, which states that the provisions within it apply to "trustees of every corporation created by the regents, *unless otherwise provided by law or by its charter.*" N.Y. Educ. Law § 226 (emphasis added). Here, Evergreen's charter provides "otherwise" for the removal of trustees, which it states is governed by Evergreen's bylaws.¹² Jt. Ex. 2-3. Pursuant to the bylaws, trustees are removed by a majority vote (with cause) or 100 percent (without cause) of the current private board, excluding the trustee who may potentially be removed. Jt. Ex. 4.

¹² Although the charter provides for the removal of a trustee by the NY Board if there is a material misstatement in the background information provided to it. Jt. Ex. 2. However, this is a mere formality, and there is no evidence that the Regents have ever enforced it. In fact, Dr. Brewster testified that the NY Board has no involvement in the selection or removal of the board of trustees. Tr. at p.41, line 14 through p.42, line 42; p.50, line 20 through p.51, line 5.

Thus, Evergreen's board of trustees is selected by private individuals, and no government or public entity/official is involved.

In addition, Evergreen's board of trustees is composed of all private individuals.¹³ See *Chicago Mathematics*, 2012 WL 6625117 at *11; *Penn. Cyber*, 2014 WL 1390806 at *2. All of Evergreen's executive officers also are private individuals.

Therefore, based on the foregoing reasons, the Regional Director correctly held that Evergreen does not satisfy the second prong of *Hawkins County*.

D. The Regional Director's reliance on *Pennsylvania Cyber Charter School* was not erroneous.

Contrary to Respondent's claim, *Pennsylvania Cyber* is directly on point with this case, and the Regional Director properly relied upon it in his decision. Union Request at 21-22.

In *Pennsylvania Cyber*, the Regional Director found that the Employer was not created directly by Pennsylvania when: 1) private individuals "originally applied for and were issued a charter" to operate a charter school by the local school district; and 2) after receiving the charter the individuals "then filed for nonprofit corporation status with the Pennsylvania Department of State to comply" with Pennsylvania's Charter Schools Law "that a charter must be a *public*, nonprofit corporation."¹⁴ *Penn. Cyber*, Case No. 06-RC-120811, 15-16 (DD & E Feb. 24, 2014). The Regional Director recognized that the employer charter school was a "corporate entity which holds a charter to function as an independent public school, in a matter more like a subcontractor than an actual department of government." *Id.* at 16.

¹³ One board member is employed by the Department of Social Services, but she serves on Evergreen's board as a private individual, and not in her capacity as a government official. Tr. at p.40, lines 2-8.

¹⁴ Contrary to Respondent's argument, individuals in *Pennsylvania Cyber* applied to receive a charter to open a charter school *before* they were incorporated into a non-profit entity. Union Request at 21; *Penn. Cyber*, RD Decis. at 15. Thus, these facts are similar to those here, where the Applicants applied to receive a charter to open a charter school before they, and other individuals, were incorporated into a non-profit education corporation. Jt. Ex. 1, 2. Thus, like in *Pennsylvania Cyber*, the Applicants created Evergreen because they, not the NY Board, filed an application to start a charter school, and which also constituted an application to be incorporated as a non-profit entity. See Union Request at 21 (citing *Penn. Cyber*, RD Decis. at 13); Jt. Ex. 1, 2.

The Regional Director recognized that Pennsylvania’s charter school law had since been amended to provide that an initial charter to establish a cyber charter school would be issued by the Pennsylvania Department of Education, not the local school district. *Id.* at 16. However, the Regional Director stated that he would reach the same result because “the instigation and initiation of action by private individuals which resulted in the establishment of the Employer [charter school], not any mandate, affirmative action, or direct intervention by a government entity.” *Id.*

Similarly here, the Applicants “originally applied for” a charter to operate a charter school with the NY Board. The Applicants’ application also constituted their application for non-profit corporation status with the NY Board to open and operate a charter school to comply with New York’s CSA that a charter must be incorporated as a nonprofit “education corporation.” N.Y. Educ. Law § 2853.1; Jt. Ex. 2. *See also* Tr. at p.38, lines 10-16; p.63, lines 5-8 (retirement program available to Evergreen’s employees is offered by non-profit entities). Once the NY Board approved the charter application, it simultaneously issued a charter and incorporated five individuals into an education corporation. Jt. Ex. 2. Without the individuals’ “instigation and initiation,” no charter would have been issued and no education corporation formed. Therefore, like the charter school in *Pennsylvania Cyber*, the Applicants’ and other private individuals’ “instigation and initiation” resulted in the establishment of Evergreen charter school, and not by “any mandate, affirmative action, or direct intervention by a government entity.”

Respondent’s argument that Pennsylvania differs from New York law because Pennsylvania only involves “exclusive actions” of one “public agent[,]” and not two like in New York, is incorrect and misplaced. Union Request at 21-22. First, under both Pennsylvania and New York’s charter schools law, private individuals must “instigate and initiate” the application

process to open and establish a charter school. Without such individual “instigation and initiation,” no charter school would exist, nor any non-profit corporation formed.

Second, under both Pennsylvania and New York’s charter schools law, the public entity that receives an application from individuals to open and establish a charter school serve the same role—to approve the charter application so that the *individual applicants*, not the public charter entity or authorizer, can start and run the charter school. Contrary to Respondent’s claim, simply because the application approval process may involve approval by two entities instead of one does not change the fact that *private individuals*, not the public agent(s), instigate and initiate the process. In New York, but for the private individuals’ actions, the charter entity could not submit an application to open a charter school to the NY Board for approval. Furthermore, here, like in *Pennsylvania Cyber*, only *one* government entity was involved in the approval process—the New York Board. Thus, Respondent’s argument about the two-step process does not apply.

For all of the foregoing reasons, and those discussed on pages 12 through 24, *supra*, of why Evergreen was created by private individuals and not by any public official or entity, the Regional Director properly relied upon *Pennsylvania Cyber* in reaching his decision, and Respondent’s arguments must be rejected.

E. The Regional Director did not erroneously rely upon New York State Court of Appeals’ decisions in *DiNapoli* and *Smith*.

In his decision, the Regional Director relied on *New York Charter Schools Association v. DiNapoli*, 13 N.Y.3d 120 (2009) and *New York Charter Schools Association v. Smith*, 15 N.Y.3d 403 (2010), simply to show that New York does not unambiguously characterize charter schools as public. RD Decision at 18-19. *DiNapoli* and *Smith* are two examples where New York courts found that charter schools were not public for purposes of the issues involved in those cases.

Respondent's contention that the Regional Director improperly relied upon these two decisions must be rejected for several reasons. Union Request at 22-24.

First, a state's characterization of charter schools as being public entities is not controlling. *See Hinds Cty. Human Resource Agency*, 331 NLRB at 1404 (citing *Hawkins County*, 402 U.S. at 602); *Chicago Mathematics*, 2012 WL 6625117 at *10; *Penn. Cyber*, 2014 WL 1390806 at *2. In *Pennsylvania Cyber*, the NLRB found that the charter school was a private employer even where the Pennsylvania labor board had previously found other Pennsylvania charter schools were public entities, and not private employers subject to the NLRA. *See* 2014 WL 1390806 at *2; *All. of Charter Sch. Emps., Local No. 6056 v. New Media Tech. Charter Sch.*, 43 PPER ¶ 87, 2011 WL 6961410 (Dec. 21, 2011) (finding Pennsylvania charter school to be public subject to state labor relations statute and not NLRA); *All. of Charter Sch. Emps., Local 6056, v. Multi-Cultural Acad. Charter Sch.*, 44 PPER ¶ 98, 2013 WL 1324566 (Mar. 28, 2013) (same); *Evelyn Hekking v. Achievement House Cyber Charter Sch.*, 44 PPER ¶ 90, 2013 WL 1182570 (March 15, 2013) (same).

Second, Respondent cannot pick and choose which aspects of New York's characterization of charter schools it wants this Board to consider in analyzing whether Evergreen is public or private. Although the two cases cited by the Regional Director involve different issues, the underlying principle is the same—New York does not consistently and unambiguously classify charter schools as public.

Continuing with its “picking and choosing” which state characterization is relevant to the Regional Director's decision, Respondent argues that the Regional Director failed to give appropriate weight to the New York Public Employment Relations Board's (PERB) decision in *Council of Supervisors (Brooklyn Excelsior)* (“*Brooklyn Excelsior*”), 44 PERB ¶ 3001 (2011).

Union Request at 24-25. However, this argument must be rejected because, as already stated above, such characterization is not controlling in determining whether Evergreen is a private employer. Also, Respondent's argument fails because *Brooklyn Excelsior* was appealed to the New York courts, where the New York State Appellate Division recognized that the issues involved in the case "'arguably' fall within the scope of the [NLRA]," and thus that the matters may be preempted by the NLRB's jurisdiction. *Buffalo United Charter Sch. v. PERB*, 107 A.D.3d 1437, 1438 (4th Dep't 2013). The case was held in abeyance until the NLRB ruled on whether it had jurisdiction over New York schools. *Id.* Thus, even the New York courts deferred to the NLRB's expertise on the matter, rather than rely upon PERB. Thus, the Regional Director properly relied upon *DiNapoli* and *Smith*, not *Brooklyn Excelsior*, as well as the Act itself, to find that New York did not characterize charter schools as administrative arms of the State.

Third, since the Regional Director issued his decision in *Hyde Leadership* and *Riverhead Charter School*, finding New York charter schools to be private, New York's Public Employment Relations Board ('PERB') has consistently found that the NLRB has jurisdiction over New York charter schools. *See e.g. Matter of United Fed'n of Teachers & New Visions Charter High Sch. for the Humanities*, 47 PERB ¶ 3023 (2014); *Matter of United Fed'n of Teachers & Imagine Me Charter Sch.*, 47 PERB ¶ 3036 (2014). Therefore, the Regional Director gave appropriate weight to the New York PERB when reaching his decision.

For all of the foregoing reasons, the Regional Director's decision was properly decided, and contains no substantial factual errors that prejudiced Respondent.

III. Contrary to Respondent's assertion, the Regional Director's decision does not raise a substantial question of law or policy because it is based on officially reported NLRB precedent.

Contrary to the union's contention, the Regional Director's decision does not raise a

substantial question of law or policy in the absence of, or a departure from, officially reported NLRB precedent. Union Request at 26.

A. There is established NLRB precedent regarding whether charter schools are considered public or private under *Hawkins County*.

In *Chicago Mathematics*, the NLRB established precedent for applying the *Hawkins County* test to charter schools to determine whether they are public or private. 2012 WL 6625117. Although *Chicago Mathematics* was decided by an illegally-appointed Board, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), in *Pennsylvania Cyber*, the current, legally-appointed Board essentially adopted the analysis and holding of *Chicago Mathematics* in its entirety. 2014 WL 1390806, at *1-*2.

Respondent incorrectly states that *Pennsylvania Cyber* is without precedential value because of the Supreme Court's holding in *Noel Canning*. Union Request at 27. However, the NLRB Board members in *Pennsylvania Cyber* were properly appointed, and the case was decided after the time period affected by *Noel Canning*'s ruling. *See Noel Canning*, 134 S. Ct. at 2557 (finding that the appointments of Block, Griffin, and Flynn were illegal); *Penn. Cyber*, 2014 WL 1390806, at *2-*3 (case was decided by properly appointed NLRB Board members, Hirozawa, Schiffer, and Johnson, with the latter dissenting).¹⁵

Thus, *Chicago Mathematics* and *Pennsylvania Cyber* set clearly established precedent regarding whether charter school employers are classified as public or private. Although neither of these cases decided whether New York charter school employers are public or private, they establish general guidelines for the NLRB and Regional Directors to follow when determining whether to assert jurisdiction over charter schools.

¹⁵ Even if *Pennsylvania Cyber* did not "officially" adopt *Chicago Mathematics*' ruling, the vast majority of cases decided under the illegally appointed Board from 2012-13 have been reaffirmed in their totality by the current, legal Board. Thus, the likelihood that the current Board would depart from *Chicago Mathematics* is slim to none.

Moreover, two Regional Director decisions, which are by the same Director who found Evergreen to be a private employer, found that New York charter schools are private employers. *See Hyde Leadership Charter School—Brooklyn*, Decision & Direction of Election, Case No. 29-RM-126444 (NLRB Region 29 May 28, 2014); *Riverhead Charter School*, Decision & Direction of Election, Case No. 29-RD-132061 (NLRB Region 29 Aug. 14, 2014). In reaching his decisions in *Hyde Leadership* and *Riverhead Charter School*, the Regional Director properly relied upon, and did not depart from, the analysis used in *Chicago Mathematics* and *Pennsylvania Cyber* to apply the *Hawkins County* test to the New York charter schools. Both cases have been granted a request for review, and are poised for the NLRB to rule on and set precedent for New York charter schools.

The instant case raises no new facts than those already before the NLRB Board. Both cases involved charter schools that were created by individuals under the New York CSA and were incorporated as education corporations by the NY Board, like Evergreen.¹⁶ Also like Evergreen, in both cases, the selection/removal of the charter schools' governing board were determined by the charter agreement with the charter entity and/or by the charter school's bylaws. *Hyde Leadership* at 13, 25; *Riverhead Charter School* at 12-13, 19-21, 38. The Regional Director's decision in this case follows the analysis he used in both *Hyde Leadership* and *Riverhead Charter School*. *See e.g.* RD Decision at 25-29. Therefore, granting review in the instant case would only be duplicative of whatever ruling the NLRB reaches in *Hyde Leadership* and *Riverhead Charter School*.

¹⁶ Respondent union argues that this case differs from *Chicago Mathematics* because the Applicants were not incorporated as a non-profit corporation before applying to create a charter school. Union Request at 28-29. However, as discussed *supra*, this does not automatically render Evergreen a public entity. Moreover, in both *Hyde Leadership* and *Riverhead Charter School*, the charter schools were incorporated as education corporations following the same process as Evergreen. Just like in *Hyde Leadership* and *Riverhead Charter School*, the Regional Director found Evergreen was not created directly by the NY Board. Thus, the Regional Director's decision in this case did not depart from established precedent regarding NY charter schools. *See* RD Decision at 25-26; *Hyde Leadership* at 24-25; *Riverhead Charter School* at 35-36.

B. The Regional Director’s decision does not depart from established NLRB precedent.

Evergreen is “akin to [a] government contractor[]” in that it operates a “public school” for the State of New York. *Chicago Mathematics*, 2012 WL 6625117 at *10 (finding that charter school employer was “akin to government contractors in that they are operating ‘public schools’ for the State of Illinois”). “The Board routinely has asserted jurisdiction over private employers that have agreements with government entities to provide certain types of services.” *Id.* at *9. *See, e.g., id.* (charter school employer that contracted with government entity to provide educational services was private); *Conn. State Conference Bd., Amalgamated Transit Union*, 339 NLRB 760 (2003) (private employer contracted with the state to provide public bus service); *Methodist Hosp. of Ky.*, 318 NLRB 1107 (1995), *enf’d. in relevant part sub nom. Pikeville United Methodist Hosp. of Ky. v. United Steelworkers of Am.*, 109 F.3d 1146 (6th Cir. 1997), *cert. denied* 522 U.S. 994 (1997) (private entity provided health care services for the state); *Jefferson Cty. Cmty. Ctr., Inc.*, 259 NLRB 186 (1981), *enf’d.* 732 F.2d 122 (10th Cir. 1984), *cert. denied* 469 U.S. 1086 (1984) (employer that contracted with or was licensed by the State to provide services for citizens with special needs was private); *NLRB v. Parents and Friends of the Specialized Living Center*, 879 F.2d 1442 (7th Cir. 1989) (same). Thus, contrary to Respondent’s contention, Union Request at 30-31, the Regional Director properly followed NLRB precedent in finding that Evergreen was not an exempt political subdivision.

Contrary to Respondent’s assertion, and for the reasons set forth in Section II.B., *supra*, and which are incorporated herein, *New York Institute for the Blind* and *Jervis Public Library* are distinguishable from the instant case, and do not control. Union Request at 31. Rather, as fully discussed in Sections I, II.A-D, *supra*, which is incorporated herein, *Chicago Mathematics* and *Pennsylvania Cyber* are directly applicable and control this case. Moreover, although the

Regional Director's decisions in *Hyde Leadership* and *Riverhead Charter* are not binding, those decisions correctly applied the analysis in *Chicago Mathematics* and *Pennsylvania Cyber* to New York charter schools, like Evergreen, and therefore are persuasive authority. Furthermore, other Regional Directors have applied *Chicago Mathematics* and *Pennsylvania Cyber* to find that charter schools are not exempt political subdivisions. *Advocates for Arts-Based Educ. Corp. d/b/a Lusher Charter Sch. & United Teachers of New Orleans, Local 527*, Case 15-RC-174745 (DD & E May 10, 2016); *Voices for Int'l Business & Educ., Inc. d/b/a Int'l High Sch. of New Orleans*, Case 15-RC-175505 (DD & E May 19, 2016).

Therefore, the Regional Director properly relied on NLRB precedent when he found that Evergreen was not an exempt political subdivision, but a private employer subject to the NLRB's jurisdiction. For all of the foregoing reasons, the Regional Director's decision does not raise a substantial policy question in the absence of, or departure from, official reported NLRB precedent, and therefore, the union's Request for Review must be denied.

IV. The Board should deny Respondent's Request for Review because there are no compelling reasons for the NLRB to decline jurisdiction over Evergreen Charter School.

In arguing that there are "compelling reasons" for the NLRB to decline jurisdiction, Respondent essentially reiterates its previous arguments. Union Request at 32-38. Thus, for the reasons already stated, and those discussed herein, Respondent's argument must be rejected.

First, Respondent argues that this Board should grant its Request for Review because education is a matter of local concern, and the state legislature intended charter schools to be subject to New York's labor relations statute. Union Request at 33. Both the charter schools in *Chicago Mathematics* and *Pennsylvania Cyber* provided educational services, yet the NLRB still asserted jurisdiction. Also, both the charter school laws in Illinois and Pennsylvania subjected

charter schools to their respective state labor laws, yet this Board still asserted jurisdiction.

Chicago Mathematics, 2012 WL 6625117, at *6, *15; *Penn. Cyber*, 2014 WL 1390806, at *2; 24 PA. CONS. STAT. § 17-1724-A(a). Since the Board’s assertion of jurisdiction over charter schools in Illinois and Pennsylvania, there is no evidence that such assertion has interfered with those states’ ability to “fully and freely promulgate policies concerning public education.” *See* Union Request at 34.

Here, Respondent has provided no evidence or argument of how this Board’s assertion of jurisdiction over Evergreen will preclude New York from promulgating policies over education, because there is none as New York will continue to have full control over its educational policies.¹⁷ In addition, this Board has “long exercised jurisdiction over both nonprofit and for-profit private schools.” *Chicago Mathematics*, 2012 WL 6625117, at *13 (citing *The Windsor School*, 200 NLRB 991 (1972); *Shattuck School*, 189 NLRB 886 (1971)). The Board has done so even “when such entities have some relationship to the state or local government.” *Id.* at *13 n. 32 (citing, e.g., *Boys and Girls Aid Society*, 224 NLRB 1614 (1976); *St. Aloysius Home*, 224 NLRB 1344 (1976)). Thus, these reasons are not “compelling” for the Board to grant Respondent’s Request for Review.

Second, Respondent again argues that the Act characterizes charter schools as public, and lists several statutory provisions in support of its argument. Union Request at 35-36. To the extent that Respondent uses these provisions to reiterate arguments it already alleged earlier, Petitioner reiterates why such arguments must be rejected as set forth in Sections I and II, *supra*.

¹⁷ To the extent that Respondent argues charter schools are subject to New York’s “strict and comprehensive regulatory oversight,” it must be rejected. Union Request at 34, 35. The CSA expressly provides for charter schools to be exempt from much of the laws that govern traditional public schools. Further, the Act provides that charter schools are to allow private individuals to “establish and maintain schools that operate independently of existing schools and school districts” to encourage innovative teaching methods, increase learning opportunities, provide expanded educational choices for parents, etc. N.Y. Educ. Law § 2850. Thus, contrary to Respondent’s contention, the state legislature intended charter schools be the exception, and have freedom in their operation in providing education to students.

Moreover, the charter school laws in Illinois and Pennsylvania had provisions similar to those relied upon by Respondent. *See, e.g.* 105 ILCS 5/27A-2 (legislation for charter schools promotes “new options within the public school system” for pupils and parents); *id.* at 5/27A-5(a) (charter schools are “public, nonsectarian, nonreligious, non-home based, and non-profit”); *Id.* at 5/27A-5(d) (charter schools comply with all health and safety requirements applicable to public schools); *id.* at 5/27A-5(f) (charter schools required to conduct audit, and submit it to State Board of Education and charter authorizer); *id.* at 5/27A-5(g) (charter school shall comply with Illinois Educational Labor Relations Act, criminal background checks, but exempt from all state laws governing public schools unless specifically provided in statute); *id.* at 5/27A-7.10 (chartering authority regulates charter schools’ compliance with law); *id.* at 5/27A-9 (charter school’s charter may be revoked by local school board and/or Commission if fails to comply with law, material violation of charter, failed to meet generally accepted standards of fiscal mismanagement, *etc.*); *id.* at 5/27A-10 (charter school’s teachers, with some exceptions, must meet school’s certification requirements for traditional public school teachers); and 40 ILCS 5/17-105, 106 (charter schools are considered employers, and charter school teachers are considered employees for purposes of the public school’s retirement fund). *See also* 24 Pa. Stat. Ann. § 17-1702-A (charter schools are to operate independent of public school districts, but provide “parents and pupils with expanded [educational] choices . . . within the public school system”); *id.* at § 17-1703-A (West) (a charter schools is an “independent public school”); *id.* at § 17-1714-A (charter schools may be sue and be sued to the same extent as political subdivisions); *id.* at § 17-1715-A (“A charter school shall not unlawfully discriminate in admissions, hiring of operation”); *id.* at § 17-1715-A(11) (“Trustees of a charter school shall be public officials”); *id.* at § 17-1719-A (application for charter school must include financial plan

and how the school will be audited pursuant to state law); *id.* at § 17-1724-A(a) (requiring at least 75 percent of charter school’s staff to “hold appropriate State certification”); *id.* at § 17-1724-A(c) (mandating all charter school employees to be “enrolled in the Public School Employees’ Retirement System . . . unless at the time of the application for the charter school the sponsoring district or the [charter school’s] board of trustees . . . has a retirement program” covering its employees or “the employee [sic] is currently enrolled in another retirement program”); *id.* at § 17-1727-A (employees of charter schools are public employees for purposes of tort liability); *id.* at § 17-1729-A (charter school’s charter may be revoked by local board of education for material violations of charter; failure to satisfy generally accepted standards for fiscal management or audit requirements, *etc.*); *id.* at § 17-1732-A (setting forth all laws charter schools are subject to); *id.* at § 17-1742-A (department of education annually assesses whether a cyber charter school is complying with its charter provisions and goals, and annually reviews cyber charter school’s performance); and *id.* at § 17-1749-A (listing statutory provisions that a cyber charter school must comply with).

Despite these provisions, the NLRB asserted jurisdiction over the charter school employers in those two states. *Chicago Mathematics*, 2012 WL 6625117, at *15; *Penn. Cyber*, 2014 WL 1390806, at *2. Thus here, the statutory provisions listed in Respondent’s Request for Review do not provide compelling reasons for this Board to grant its Request, nor to not assert jurisdiction over Evergreen.

Third, Respondent argues that comity should preclude this Board from asserting jurisdiction. Union Request at 36-38. Respondent argues that asserting jurisdiction would violate this Board’s principle of comity. *See id.* at 36. But this argument makes no sense, since the NY courts and the NY PERB have both indicated that they were willing to defer to the Board’s

expertise in these matters, so there is no risk of inconsistent regulations as between the state labor authorities and this Board. *See Roosevelt Children's Acad. Workers' Ass'n*, 2015 WL 660555; *United Fed'n of Teachers, Local 2*, 2014 WL 7791956; *United Fed'n of Teachers, Local 2*, 2014 WL 6449680. Thus, there is no inconsistency between the state agency and federal policy. Even if the NY PERB had not deferred, its characterization of charter schools is not controlling on the NLRB's determination.

Also, Evergreen's voluntary recognition of Respondent as collective bargaining representative does not, in of itself, establish PERB's jurisdiction over Evergreen. In addition, PERB has never applied the *Hawkins County* test to determine whether Evergreen is a public or private entity.

Contrary to Respondent's claim, there is no disruption in the bargaining relationship between Respondent and Evergreen. Both New York's labor statute and the NLRA permit decertification elections. Here, Evergreen's employees voted in favor of removing Respondent as their bargaining representative 15 to 11. If the decertification election was held by PERB, the result would likely be the same. Thus, Respondent's bargaining relationship with Evergreen is at an end since a majority of the employees no longer support it. "There could be no clearer abridgment of § 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity" to grant exclusive representation status to a minority union. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 737–38 (1961).

Even if Respondent still had majority support, Respondent and Evergreen could continue to enjoy their five-year collective bargaining relationship under the NLRA. The NLRA's provisions are similar to those of New York's Taylor Law. Both statutes provide the collective

representation of employees and establishing unfair labor practices for interfering with such representation. There is no basis for the union to argue that the NLRB's assertion of jurisdiction would disrupt labor peace. Respondent also has failed to provide any argument of how this Board would "unduly alter the relationship" between it and Evergreen. Thus, Respondent has no compelling argument that comity exists.

Also, even though there is no change in state or federal law—there had not been any in *Chicago Mathematics* or *Pennsylvania Cyber*, yet this Board still asserted jurisdiction. Therefore, Respondent's argument to the contrary must be rejected. *See* Union Request at 36-37.

Fourth, Respondent's arguments about charter school's involvement in a school district's bargaining unit are also not "compelling." First, Evergreen is a start-up school, not a charter school that was converted from a traditional public school. Therefore, Respondent's argument about conversion charter schools being part of the same collective bargaining unit as those in a traditional school district do not apply here. Second, § 2854.3(b-1), which provides that charter employees may be represented by the same bargaining representative as the local school district but in a *separate bargaining unit*, also provides that: 1) such statutory provision can be waived, § 2854.3(b-1)(ii); 2) such statutory provision is inapplicable to charter renewals, § 2854.3(b-1)(iii); and 3) nothing in such statutory provision "shall be construed to subject a charter school . . . or its employees to any collective bargaining agreement between any public school district and its employees or to . . . part of any negotiating unit at such school district." § 2854.3(b-1)(iv).

Each charter school is an independent entity. The CSA has different rules for start-up charter schools than it does for conversion charter schools. Thus, contrary to Respondent's contention, there is nothing irrational about the NLRB asserting its jurisdiction over Evergreen, and not other New York charter schools. Moreover, both Illinois and Pennsylvania's charter

schools laws established different types of charter schools, yet this did not prevent the NLRB from asserting jurisdiction.

Finally, the Regional Director only decided that Evergreen, and not all New York charter schools, is a private employer. Thus, the union's request that the Board grant its Request for Review to determine whether the Board should assert jurisdiction over all New York charter schools must be denied. Union Request at 38.

For all of the foregoing reasons, there are no compelling reasons for the Board to grant Respondent's Request for Review.

CONCLUSION

For all of the foregoing reasons, Respondent's Request for Review should be summarily denied, and the Regional Director's Decision affirmed.

Dated: July 18, 2016

Respectfully submitted,

/s/ Sarah E. Hartsfield

Sarah E. Hartsfield,
Glenn M. Taubman
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Tel: (703) 321-8510
Fax: (703) 321-9319
E-Mail: seh@nrtw.org
gmt@nrtw.org

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, a copy of the foregoing Memorandum in Opposition was filed electronically, and was served on all parties by e-mail.

/s/ Sarah E. Hartsfield
Sarah E. Hartsfield